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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-770

REV. LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,
Petitioners,

versus

ADAMS COUNTY BOARD OF SUPERVISORS; SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER, and E. A. REDD, Members of the Adams County Board of Supervisors,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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TABLE OF CONTENTS

Page

A. Respondents Mis-state the Question Presented. 2

B. The Question of Injury: The Rule of Absolute Equality Is Perfectly Compatible with Gerrymandering of the Worst Sort Unless this Court Establishes Strict Restraints on Racial Gerrymandering. 3

C. Past History of Racial Discrimination Affecting Voting in Adams County. 11

D. This Case Is Now Ripe for Final Review in this Court. 15

TABLE OF AUTHORITIES

Cases

Anderson v. *Nosser*, 438 F.2d 183 (5th Cir. 1971), modified and aff'd en banc, 456 F.2d 835 (1973), cert. denied, 409 U.S. 848 (1972) 13

Bussie v. *Governor of Louisiana*, 333 F. Supp. 452 (E.D. La. 1971), *modified*, 457 F.2d 796 (5th Cir. 1971), *vacated and remanded sub nom Taylor* v. *McKeithen*, 407 U.S. 101 (1972) 3

Gomillion v. *Lightfoot*, 364 U.S. 339 (1960) 3

Graves v. *Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972), *aff'd in relevant part, White* v. *Regester*, 412 U.S. 755 (1973) 3

Howard v. *Adams County Bd. of Supervisors*, (No. 71-1406) 15

Kirkpatrick v. *Preisler*, 394 U.S. 526 (1969) 6

Reynolds v. *Sims*, 377 U.S. 533 (1964) 4, 5, 10

TABLE OF AUTHORITIES (Continued)

Page

Sims v. *Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965) 3

United States v. *Mississippi*, 380 U.S. 128 (1965) 12

United States v. *Natchez Sp. Mun. Sep. School Dist.*, Civil No. 1120 (S.D. Miss. filed Sept. 7, 1965) 12

Wells v. *Rockefeller*, 394 U.S. 542 (1969) 6

Other Authorities

D. Weeks, "The White Primary," 8 Miss. L.J. 135 (1935) 12

G. Tyler and D. Wells, *The New Gerrymander Threat*, 78 The American Federationist (Feb. 1971) 7

P. Lewinson, RACE, CLASS, AND PARTY, Appendix III (1932) 12

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PETITIONERS' REPLY MEMORANDUM

Respondents' Brief in Opposition was not filed or served until long after the deadline imposed by Rule 24(1) of the Rules of this Court had passed. This Petition was docketed on November 13, 1973. Respondents' Brief in Opposition was due on or before December 13, 1973. Respondents had received copies of the Petition before it was docketed, but did not serve copies of their Brief in Opposition upon counsel for petitioners until February 14, 1974, more than two months after

it was due, no extension of time having been requested or granted.

Nevertheless, petitioners file herewith their response to the Brief in Opposition.

A. RESPONDENTS MIS-STATE THE QUESTION PRESENTED.

Respondents in their Brief in Opposition attempt to convert petitioners' anti-gerrymander and anti-dilution argument into a claim for proportional representation. They contend that the question presented is whether plaintiffs are constitutionally entitled to two black majority districts as a matter of right; whether Adams County blacks are entitled to have the new district lines carefully drawn so that blacks will have a majority of population in two districts (Brief for Respondents, pp. 2, 4).

This seriously mis-states the question presented and warps and distorts the anti-gerrymander and anti-dilution argument. While some form of remedial and benign districting may ultimately be required in some cases to overcome the past effects of racial discrimination in voting and districting, cf. *Taylor* v. *McKeithen*, 407 U.S. 191, 193 (1972), we believe the Court does not have to decide that issue to grant plaintiffs the relief which they request in this case. The facts of this case show that the defendants consciously and intentionally approved a redistricting plan which carves up and fragments a readily identifiable black population concentration — sufficiently large to make up a separate supervisors' district — among four white

majority districts, thus submerging and cancelling out black voting strength.

That the Constitution protects the franchise of black voters against racial gerrymandering which dilutes black voting strength, particularly after a long history of racial discrimination affecting voting, is firmly established in our jurisprudence. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Sims* v. *Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965); *Bussie* v. *Governor of Louisiana*, 333 F. Supp. 452 (E.D. La. 1971), *modified*, 457 F.2d 796 (5th Cir. 1971), *vacated and remanded sub nom Taylor* v. *McKeithen*, supra. Last term this Court unanimously affirmed a District Court decision voiding multimember districts in Texas on the basis of the conclusion that such districts "are unconstitutional in that they dilute the votes of racial minorities." *Graves* v. *Barnes*, 343 F. Supp. 704, 735 (W.D. Tex. 1972), *aff'd in relevant part, White* v. *Regester*, 412 U.S. 755 (1973). The only difference is that here the dilution of minority voting strength is effectuated, not by at-large elections or multi-member districts, but by the racially discriminatory drawing of district lines which accomplishes the same result.

B. THE QUESTION OF INJURY: THE RULE OF ABSOLUTE EQUALITY IS PERFECTLY COMPATIBLE WITH GERRYMANDERING OF THE WORST SORT UNLESS THIS COURT ESTABLISHES STRICT RESTRAINTS ON RACIAL GERRYMANDERING.

Perhaps the greatest difficulty the courts below have had in conceptualizing the issues presented in this case

has been in pin-pointing the harm or injury suffered by Adams County black voters as a result of this redistricting plan. The respondents argue in their Brief in Opposition that the redistricting plan (like their at-large election scheme voided when the United States Attorney General objected to the 1966 amendment to Miss. Code § 2870) evenly distributes the black population of the county among the districts in close proportion to their percentage in the over-all county population (Brief, p. 14). In its prior opinion the Court of Appeals in approving the prior redistricting plan noted this racial "balance" and further noted that blacks continued to command a black majority in District 4 (453 F.2d at 458).

The question arises: Has the application of the rule of strict equality of population in Adams County, Mississippi, enhanced the opportunities of the constitutionally protected minority to fair and effective participation in the political processes, or has it simply made racial gerrymandering easier?

Prior to redistricting in 1970 (the first redistricting plan), white voters in Adams County, which is 47.9 percent black, enjoyed a disproportionate 4-1 supervisors' district advantage over blacks because the five districts were malapportioned in violation of *Reynolds* v. *Sims*, 377 U.S. 533 (1964). The voting strength of Adams County's black voters was debased and diluted because the black population was concentrated in District 4 (the only black majority district), which contained 15,074 persons (1970 Census), twice the size of an equally apportioned district (norm, 7,459 per-

sons). Thus, by reapportionment standards, the population of District 4 (75.3 percent black) was severely under-represented, and this malapportionment severely diluted the voting strength of blacks and unlawfully maximized the number of white majority districts.

By carefully redrawing the new districts (the second redistricting plan, at issue here) to preserve white incumbent supervisors in their respective districts and to fragment and disperse the black population concentration in old District 4 among all five of the new districts, the defendants have thwarted the constitutionally protected rights of Adams County blacks to "fair and effective participation in the political processes," *Reynolds*, supra, 377 U.S. at 565, to the same extent that malapportionment thwarted those rights prior to 1970. Thus, although the new districts are substantially equal in population (although not as equal as plaintiffs' proposed districts with a span of only 1.79 percent as opposed to 2.87 percent in defendants' plan), Adams County blacks — with almost half the population — have their voting strength debased and diluted once again.

This time the mechanism for dilution is racial gerrymandering of district lines rather than malapportionment, and after extensive litigation to gain equi-populous districts blacks are relegated once again to a voting majority in only one district and whites once again preserve their disproportionate 4-1 advantage. For Adams County blacks, nothing has changed. What, then, is the value of the standards of strict arithmetic equality imposed by the reapportionment decisions of

this Court if, in achieving equi-populous districts, Southern officials are permitted to protect white incumbents, abandon pre-existing political and natural geographic boundaries, Census units, and compact districts, and through racial gerrymandering totally frustrate the popular will and maximize the political advantage of the whites in power and minimize the voice of repressed blacks struggling for an equal voice in county government?

Members of this Court, dissenting in some of the reapportionment cases, have recognized this danger. Mr. Justice Harlan, joined by Mr. Justice Stewart, dissenting in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), and *Wells* v. *Rockefeller*, 394 U.S. 542 (1969), pointed out:

> "The fact of the matter is that the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues. The legislature ... must create a structure which will in fact as well as theory be responsive to the sentiments of the community ... If the Court believes it has struck a blow today for fully responsive representative democracy, it is sorely mistaken. Even more than in the past, district lines are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs." 394 U.S. at 551, 552.

Similarly, Mr. Justice White in his dissent wrote:

> "Today's decisions on the one hand require precise adherence to admittedly inexact census figures, and on the other downgrade a restraint on a far greater potential threat to equality of representation, the gerrymander. Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality..." 394 U.S. at 555.

This is not to say that the salutary gains achieved by requiring substantial equality of population must be discarded. Rather, the Court is petitioned to establish strict anti-gerrymandering standards pursuant to the Constitutional prohibitions against racial discrimination and abridgment of black voting strength to prevent racial gerrymandering within the population equality requirement.

The unconstitutionality of defendants' plan is perhaps most strikingly illustrated by the theoretical discussion in G. Tyler and D. Wells, *The New Gerrymander Threat*, 78 The American Federationist (No. 2) (Feb. 1971). Noting that "the 1970's may well turn out to be the decade of the great gerrymander," (p. 1), the authors show conclusively how popular voting strength may be frustrated and thwarted in a hypothetical state (closely resembling

Adams county conditions) that is entitled to four elected representatives (here, five), and has a city (like Natchez, aligned on the state's/county's boundary) which contains half of the state's population. This state is evenly divided in population (50-50) between two political parties (races), Party X (blacks) and Party Y (whites). Adherents of Party X are most heavily concentrated in the city (here, north Natchez and old District 4, 75.3% black), which prior to redistricting was included entirely with a single malapportioned district. The majority of the members of Party Y (whites) are spread throughout the rural area outside the urban center.

The first ilustration closely resembles Adams County prior to redistricting in 1970. Party Y enjoys a disproportionate 3-1 advantage over Party X as a result of, and because of, malapportionment. Party X members (blacks here) are concentrated by gerrymandered boundary lines into District 1 (here District 4), which in the illustration contains half the state's population, thus maximizing the number of "safe" seats held by Party Y.

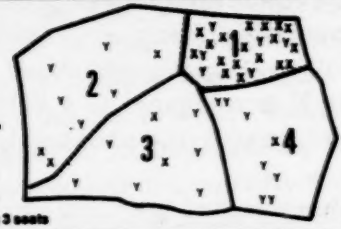
The second illustration shows exactly what happened in Adams County. The one-person, one-vote requirement is applied to provide districts precisely equal in population, but Party Y (presumably in charge of redistricting) can perpetuate its discrimination against Party X and maintain its disproportionate 3-1 advantage by carefully redrawing the district lines so that the Party X concentration in the city, formerly in a single district (blacks in north Natchez), is fragment-

Gerrymandering Comes in Many Shapes...

With Unequal Districts...

District 1 — Population: 1,000,000; Party "X" wins by 3-1 margin
District 2 — Population: 333,334; Party "Y" wins by 5-3 margin
District 3 — Population: 333,333; Party "Y" wins by 3-1 margin
District 4 — Population: 333,333; Party "Y" wins by 7-1 margin

☐ Party "X" wins 1 seat; ☐ Party "Y" wins 3 seats



(Each District Has 500,000 Population)

District 1 — Party "X" wins by 3-1 margin
District 2 — Party "Y" wins by 3-1 margin
District 3 — Party "Y" wins by 7-5 margin
District 4 — Party "Y" wins by 7-5 margin

☐ Party "X" wins 1 seat;
☐ Party "Y" wins 3 seats



With Equal Districts.

(Each District Has 500,000 Population)

District 1 — Party "X" wins by 7-5 margin
District 2 — Party "X" wins by 2-1 margin
District 3 — Party "X" wins by 7-5 margin
District 4 — Party "Y" wins by 5-1 margin

☐ Party "X" wins 3 seats;
☐ Party "Y" wins 1 seat



But Apportionment Can Be Equitable.

(Each District Has 500,000 Population)

District 1 — Party "X" wins by 3-1 margin
District 2 — Party "X" wins by 3-1 margin
District 3 — Party "Y" wins by 2-1 margin
District 4 — Party "Y" wins by 5-1 margin

☐ Party "X" wins 2 seats; ☐ Party "Y" wins 2 seats



ed and dispersed among three overly elongated and uncompact "safe" Party Y majority districts. In three of the four new, equi-populous districts Party Y retains decisive majorities. Thus, although reapportionment requirements have provided four districts equal in population, Party X — with half the voters — has its voting strength minimized and diluted once again. Party X is relegated to a voting majority in only one district, exactly the situation prior to reapportionment.

Using this, and the third example, in which the tables are turned and Party X gains a 3-1 advantage, the authors conclude:

> "The way the districts are divided can make the difference between one party or the other winning a 3-1 advantage. And this can be done just as easily when the districts have equal population as when they are unequal." (p. 2)

The fourth illustration, with the caption "But Apportionment Can Be Equitable," closely resembles the plaintiffs' proposed alternative redistricting here. The four legislative seats are equitably apportioned to each party according to its voting strength in the population. The city is split between two compact districts (each of which has a Party X majority), and the rural area is likewise divided between two compact districts with Party Y majorities.

Tyler and Wells, who are serious students of the American plitical scene and whose exposes of the inequities of malapportionment contributed to the *Reynolds*

decision, then show how fairness in redistricting can be achieved without the necessity of adopting a rule of proportional representation. "A fair plan is one not drawn with a view towards partisan or individual advantage" (p. 7). They propose a series of "districting rules" intended to minimize partisan advantage and to contribute to "equitable" districting, which the Court could well apply to this case. Apart from the traditional anti-gerrymandering considerations, such as contiguity and a 2 percent population equality standard, they also suggest that divisions of cities and towns should be minimized, and "the aggregate length of all boundary lines shall be as short as possible," (p. 7), standards satisfied by the plaintiffs' proposed plan but obviously violated by the defendants' plan.

C. PAST HISTORY OF RACIAL DISCRIMINATION AFFECTING VOTING IN ADAMS COUNTY.

The respondents make a serious effort to mislead this Court as to the nature of this case by portraying Adams County, Mississippi, as a veritable racial utopian where blacks and whites have lived together in complete and blissful racial harmony, even prior to the passage of the Voting Rights Act of 1965 (Brief in Opposition, p. 12). Since it is important to the determination of whether the redistricting plan at issue perpetuates a past pattern of denying to blacks equal access to the political process, we note that the respondents omit to inform the Court that this Record, and matters subject to judicial notice, contain evidence that:

1. At least until 1952, the Rules of the Mississippi Democratic Committee excluded blacks from participation in the Democratic primaries of the state. P. Lewinson, RACE, CLASS, AND PARTY, Appendix III (1932); D. Weeks, "The White Primary," 8 Miss. L.J. 135, 138-39 (1935).

2. At least until 1965, and possibly thereafter, the public schools of Natchez and Adams County were segregated on the basis of race, and a dual, bi-racial school system was maintained. *United States* v. *Natchez Sp. Mun. Sep. School Dist.*, Civil No. 1120 (S.D. Miss. filed Sept. 7, 1965).

3. The District Court in this case determined that "Prior to the passage of the Voting Rights Act of 1965, qualified Black voters in Adams County, Mississippi, were substantially disfranchised" (Opinion of July 20, 1971, pp. 19-20), obviously by the racially discriminatory voter registration tests and procedures abolished by that Act. See *United States* v. *Mississippi*, 380 U.S. 128 (1965).

4. In 1965 George Metcalf, then president of the Adams County branch of the NAACP and active in voter registration, was seriously injured when a bomb placed in his car exploded. 1971 Hearing Tr., pp. 82-83.

5. In 1966 Whorlis Jackson, then treasurer of the NAACP county branch and active in voter registration, was killed by a bomb in his car, and his murderers were never found or convicted. 1971 Hearing Tr., pp. 80-82.

6. In October, 1965, Natchez city officials arrested approximately 700 civil rights demonstrators under an unconstitutional parade ordinance, unlawfully denied them their right to be taken before a magistrate for a hearing on probable cause and bail, and transported more than 150 of the demonstrators by bus over 200 miles to the Mississippi State Penitentiary at Parchman where they were unlawfully subjected to "sub-human treatment which beggars justification and taxes credulity." At Parchman they were "processed" by being forced to strip naked, take cold showers, and drink laxatives. Many were beaten, and denied medical treatment. Several days later they were discharged and told to get home on their own. *Anderson* v. *Nosser*, 438 F.2d 183, 186 (5th Cir. 1971), modified and aff'd en banc, 456 F.2d 835 (1972), cert. denied, 409 U.S. 848 (1972).

7. In 1966 the all-white Adams County Board of Supervisors switched from district to county-wide supervisor elections pursuant

> to the 1966 amendment to Miss. Code § 2870 (1956 Recomp.), with the inescapable effect of diluting black voting strength in District 4 and preventing the election of a black supervisor from that district. In 1969 the United States Attorney General, with notice of the Adams County facts, ruled that the 1966 amendment to Miss. Code § 2870, along with two other amendments to the state's election laws, "had as their purpose and have had as their effect the denial and the abridgment of the right to vote on account of race or color." Complaint, Ex. D.

These facts completely refute respondents' contention that: "The conclusion is inescapable that Adams County has for many years been one of the most progressive in our country. * * * The assertion that Adams County has a 'long history of voter discrimination' is not accurate" (Brief for Respondents, p. 12).

Respondents' references in their Brief (pp. 3, 4) to the election returns, some of which are not even in the Record, prove rather than refute petitioners' contentions that racial bloc voting prevails and that blacks have been "frozen out" of the political processes. No black candidates for county office in Adams County have ever been elected from a white majority district. As respondents point out, the only black candidates who were successful in the 1967 elections were from District 4; candidates in Districts 1 and 5 were soundly defeated. In the 1971 county elections again, the only

district carried by black candidates was District 4. Although one black candidate won election to the Natchez city council in the 1972 municipal elections (not in the Record) (Brief in Opposition, p. 4), showing substantial black voting strength in Natchez, under the defendants' redistricting plan Natchez is fragmented and dispersed among all five proposed districts, thus admitting our point that the redistricting substantially cancels out Natchez black voting strength.

D. THIS CASE IS NOW RIPE FOR FINAL REVIEW IN THIS COURT.

Respondents finally contend that the prior adjudication in this case, and the prior denial of certiorari by this Court, should be a sufficient basis for denial of certiorari here (Brief for Respondents, pp. 16-17). But review of the prior decisions would have been premature and untimely, since the defendants had not yet filed with the District Court a plan providing for districts substantially equal in population, and plaintiffs had not yet filed their alternative redistricting plan. Indeed, this was the basis on which respondents opposed our Petition for a Writ of Certiorari in the prior case (Brief in Opposition, p.1, *Howard* v. *Adams County Bd. of Supervisors,* No. 71-1406). Having opposed our prior Petition on the grounds that the appeal was premature and constituted a piecemeal appeal not decisive of the primary issues involved, respondents should be estopped from arguing (now that all the issues presented in this case are ripe for final adjudication by this Court) that petitioners should be foreclosed from seeking review in this Court of the important

issues presented because of the results of the prior, and incomplete, adjudication. All of the issues presented in this case have now been adjudicated by the courts below, and this case is now final and ripe for final review by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this day mailed, postage prepaid, three copies of the foregoing Petitioners' Reply Memorandum to the following counsel:

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This the ____ day of March, 1974.

_____